the district court and in the court of appeals. Resp. Brief at 38-39. This argument should be rejected for several reasons.

First, this argument disregards the record by overlooking the fact that, by granting the petition for a writ of certiorari, this Court has already ruled that the constitutional issue is properly presented. In their brief in opposition to the petition, Respondents argued that Petitioners had waived the right raise any constitutional issue. Resp. Brief in Opp. at 15. In granting the petition, this Court did not, of course, limit the issues presented by Petitioners in any way. Thus, this Court has already been presented with the contention that Petitioners waived the constitutional issue in this case, and this Court has not acted upon it.

In any event, Respondents' waiver argument fails because Petitioners specifically addressed constitutional issues in both the district court and the court of appeals. In both courts, Petitioners contended that the Corps' assertion of jurisdiction over hydrologically isolated, intrastate wetlands was contrary to the constitutional principles set forth in *Lopez* and *Morrison*, *supra*. Pet. Dist. Ct. Brief at ii, 15-16; Pet. Cir. Ct. Brief at 28-30. Even more fundamentally, Petitioners' lower court arguments focused upon this Court's opinion in *SWANCC*, which considered the issue of CWA jurisdiction in light of *Lopez* and *Morrison*, and which specifically discussed that issue in terms of Congress' Commerce Clause authority. *SWANCC*, 531 U.S. at 172-73. Thus, Petitioners did not, as Respondents, suggest, "sandbag" the district court by withholding constitutional arguments. Because the constitutional dimension of this case was always in the forefront of any argument and analysis, there can be no doubt that the district

judge was award of these constitutional issues when he decided to adopt the magistrate's report in its entirety, and the waiver doctrine that Respondents invoke is simply inapplicable here.

At the most essential level, Respondents' arguments about waiver are unavailing because they do not relate to the foundational question of whether constitutional issues were actually raised in this case. Instead, they ultimately relate to the form in which the constitutional issues were presented. In effect, Respondents argue that Petitioners have waived their constitutional arguments because those arguments were not presented in the district court in precisely the same manner that they are presented to this Court. But this Court has held that "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was presented below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Because constitutional issues have been presented in the lower courts, this Court may also consider those issues, notwithstanding any differences in the form of the arguments.

2. Regulating Hydrologically Isolated, Intrastate Wetlands Improperly Intrudes upon the States' Traditional Police Power to Regulate Land and Water Use.

In *Lopez* and *Morrison*, this Court reiterated the general principle that Congress' authority to regulate activities under the Commerce Clause is not unlimited. More specifically, this Court held that the Commerce

Clause does not give Congress *carte blanche* to assert authority in areas that have traditionally been the exclusive province of the States' police power. In *Lopez*, this Court rejected the attempt to permit a federal intrusion into school law, and, in *Morrison*, this Court rejected a similar attempt with respect to family law. *Lopez*, 514 U.S. at 610-11; *Morrison*, 529 U.S. at 618. In this case, the Corps' attempt to use the CWA as an instrument to regulate hydrologically isolated, intrastate wetlands constitutes the same kind of incursion into state power that was invalidated in *Lopez* and *Morrison*.

This Court has recognized that, even though it creates a comprehensive regulatory scheme, the Clean Water Act does not invalidate the traditional recognition that the States have primary authority to regulate land and water use. In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court discussed the effect of the CWA on existing state law regulating water use. It pointed to the general constitutional principle that ""the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."" *Milwaukee*, 451 U.S. at 316 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, this Court concluded that States retain substantial authority to regulate waters and wetlands, notwithstanding the reach of federal power under the CWA. *Id.* And this Court reiterated that conclusion in *SWANCC*, invalidating the Migratory Bird Rule because, among other things, it impermissibly constituted a "significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

In their brief in the *Rapanos* case, even Respondents have recognized that, notwithstanding the comprehensive nature of the Clean Water Act, the States have the primary responsibility for preventing and controlling water pollution, and that this role is the product of their traditional authority to regulate land and water use, not simply the product of the delegation of federal power through the CWA. For example, Respondents assert that

> Even when the term "waters of the United States" is understood to encompass nonnavigable tributaries and their adjacent wetlands . . . States play an important role in pollution control, both under, and independent of, the CWA. . . . Moreover, after *SWANCC*, States alone have jurisdiction over intrastate, "isolated" waters lacking a significant nexus to traditional navigable waters.

Resp. Brief in *Rapanos* at 38-39 n. 19. Even more significantly, Respondents concede that, even apart from the CWA, States have "the 'primary' role . . . in preventing and addressing water pollution." *Id.*

Given the primacy and extent of State authority, federal power must be precisely defined to avoid disturbing the constitutional allocation of power between the States and the federal government. But, as Petitioners have argued in their principal brief (Pet. Brief at 40-46), these federalist principles will be undermined if the Corps may assert jurisdiction over any wetland that is physically proximate to a tributary of a traditionally navigable water, regardless of whether it is hydrologically connected to the navigable water itself. Such an extension of the CWA would

make federal anti-pollution policy the primary source of regulation for these isolated waters, displacing state law, which has traditionally been the primary source of authority over such bodies of water. As in *Lopez*, where this Court held that the Commerce Clause did not permit federal gun-control policy to displace the States' authority to make school law, and as in *Morrison*, where this Court held that the Commerce Clause did not permit federal civil rights policies to displace the States' authority to make family law, this Court should rule here that the Commerce Clause does not authorize Congress to displace the States' primary role in regulating and water use.

Contrary to Respondents' arguments, this Court's recent opinion in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) is inapposite here because it does not relate to this particular principle of federalism. In *Raich*, this Court considered the constitutionality of a federal statutory scheme regulating the manufacture, distribution and sale of drugs, and it focused on the question whether small-scale, intrastate drug use and manufacture could be excluded from the national market. There was no suggestion in that case that Congress lacked authority to regulate the national market or that the federal statutory scheme, in whole or in part, intruded upon the States' ability to exercise authority in an area of law traditionally reserved for their exclusive control. In short, *Raich* did not implicate the same principles of federalism that are at issue here and that were at issue in *Lopez* and *Morrison*, and it does not help Respondents demonstrate why the CWA should be interpreted to impinge upon the States' ability to be the primary regulators of land and water use within their borders.

C. The Achievement of the Clean Water Act's Policy Objectives Does Not Require the Regulation of Hydrologically Isolated Wetlands.

Respondents argue that deleterious consequences will follow if federal authority under the CWA is not extended to hydrologically isolated wetlands. Specifically, the Corps insists that the achievement of the CWA's comprehensive policy objectives depends upon giving maximum discretion to the Corps to identify the kinds of connections – hydrological or otherwise – that will constitute the necessary "significant nexus" with traditionally navigable waters. Petitioners have already shown why conferring such discretion upon the Corps is unwarranted in both statutory and constitutional terms; but it is unwarranted in terms of policy considerations as well. The CWA can still effectively protect the biological, chemical and physical integrity of the Nation's navigable waters if its scope is limited to water bodies, including wetlands, that, at a minimum, are literally bound up with the navigable waters.

Respondents place great emphasis on the fact that Congress intended the CWA to be a comprehensive remedial statute, designed to prevent and control water pollution throughout the Nation. Although there is no dispute that Congress intended the CWA to have a comprehensive character, the comprehensiveness of federal authority under the statute does not depend upon subjecting any and every water body or wetland in the United States to CWA jurisdiction. In specifically discussing comprehensiveness of the CWA, this Court has stopped short of holding that its reach is unlimited, noting that

"the Act applies to . . . *virtually all* bodies of water." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added). Even more importantly, of course, this Court's decision in *SWANCC* identified a category of waters that could not, in any event, be included within CWA jurisdiction – hydrologically isolated, intrastate ponds. *SWANCC*, 531 U.S. at 167. Excluding similarly isolated wetlands from federal authority under the CWA will not restrict the statute's comprehensive character any more than this Court's decision in *SWANCC* did.

Respondents also argue that the Corps' ability to effectively administer the CWA will be undermined if it is required to determine the existence of a hydrological connection before exercising jurisdiction. This argument is unpersuasive for two principal reasons.

First, requiring a hydrological connection as the minimal jurisdictional prerequisite will not, as Respondents suggest, meaningfully increase the Corps' administrative burden or make such administration unmanageable. As the Corps acknowledges (Resp. Brief at 32), and as this Court requires, *Riverside Bayview*, 474 U.S. at 135 n. 9, the Corps must always evaluate the nature and significance of the connection between a wetland and the navigable waters. Requiring the Corps to make this determination at the outset of the administrative process and as a prerequisite to the assertion of jurisdiction does not, therefore, affect the substance of what the Corps must do; it only changes the stage at which it must be done and assures that the Corps' findings on this point will be subject to more searching judicial review.

Judicial review is especially important given the prevalent tendency to assume that every wetland has a hydrological connection to the navigable waters. If the

Corps is allowed to have virtually unfettered discretion to determine the scope of its jurisdiction, it could assert jurisdiction purely on the basis of the assumption that a wetland is hydrologically connected to a navigable water. *See* Brief of Western Organization of Resource Councils, et al., at 16 ("the Corps should not be required to expend extensive resources scientifically affirming a connectivity on a case-by-case basis that is a generally accepted scientific fact"). The grant of such authority to the Corps would, in many cases, deprive persons of their property rights without a meaningful factual inquiry and without meaningful judicial review. In this case, the Corps based its initial assessment of jurisdiction upon just such an assumption, which turned out to be flatly wrong. *See* J.A. 92a. Although the Clean Water Act creates extensive federal power in the name of preventing water pollution, it cannot be understood to create power such as this.

Second, turning the existence of a hydrological connection into a question of jurisdictional fact does not, as Respondents contend, present an unnecessarily difficult factual burden. As Respondents and their *Amici* point out, most wetlands have a significant surface or ground water connection with a tributary of a navigable water. *See, e. g.*, Resp. Brief at 25-29; Brief of Western Organization of Resource Councils, et al., at 13-16. One *Amicus* has noted that such connections are so prevalent that scientists routinely presume their existence as a matter of course. Brief of Western Organization of Resource Councils, et al., at 16. Moreover, such connections can be readily determined from soil analysis and even from aerial photography. *See United States v. Rapanos*, 376 U.S. 629, 644 (6th Cir. 2004) (noting than a government expert relied upon soil analysis and aerial photography to identify wetlands

and their hydrological connections). These wetland characteristics can be evident even if the wetland has been partially or substantially filled. In *Rapanos*, the land owner engaged in extensive filling without a permit, but the Corps was still able to identify wetlands and their connections. *See id.* Given these facts, it is hard to imagine how the Corps will be unduly burdened by the minimal requirement of finding a hydrological connection between a wetland and a navigable water before it asserts jurisdiction.

D. There Is No Dispute in the Administrative Record That the Wetland on Petitioners' Property Is Hydrologically Isolated.

As they have at earlier stages in this case, Respondents maintain that this case does not really raise any issues regarding federal jurisdiction over hydrologically isolated wetlands because the wetland on Petitioners' property is not, in fact, hydrologically isolated. As Petitioners demonstrated in their principal brief, this contention is flatly contradicted by the record.

Respondents assert that the wetland here is hydrologically connected to the tributary system of Lake St. Clair because water may overtop the berm separating the wetland from the adjacent drainage ditch. Of course, as Petitioners have pointed out, this is a purely hypothetical connection, and nowhere in the administrative record did the Corps ever find that such a connection actually existed. In fact, to the contrary, the Corps repeatedly concluded that the wetland was not a part of the Lake St. Clair watershed and that waters from the wetland did not flow into any

tributaries of Lake St. Clair. *See* J.A. 106a ("berms and other features . . . presently isolate the wetland from the S-O Drain and receiving water."); *see also* J.A. 36a-37a, 40a, 82a-83a, 99a-100a, 185a.

Respondents also insist that Petitioners' property serves a hydrological function, which is essential to the CWA's purposes, because it can store storm-water runoff, thereby facilitating the control of flooding in the Lake St. Clair tributary system. Here again, however, Respondents have identified a purely theoretical characteristic of the wetland, not an actual one. The administrative record reveals that the wetland does not receive any runoff from any other property; a drainage ditch along both sides of the adjacent road prevents water from running on to the wetland from the west, and a retention pond on the property to the north prevents any water from entering the wetland from that direction. J.A. 36a. Consequently, notwithstanding Respondents' suppositions, the wetland cannot possibly serve any flood control function.

Because it does not receive water from any part of the Lake St. Clair watershed, and because it does not send water to any part of that watershed, the wetland on Petitioners' property is, in every respect, hydrologically isolated. Allowing the Corps to regulate this wetland will not serve any function in the prevention and control of water pollution anywhere.

CONCLUSION

In *SWANCC*, this Court considered the scope of federal authority under the Clean Water Act, and it concluded that such authority was limited so that the

Corps did not have discretion to define hydrologically isolated ponds as "navigable waters" or "waters of the United States." This conclusion did not depend upon any unique factual characteristics about ponds, as distinct from other water bodies or wetlands; and this conclusion was derived from a general analysis of the Act's scope, not from a narrowly focused consideration of the challenged regulation. Consequently, the principle established by this conclusion should be applied to intrastate wetlands that are hydrologically isolated, as with the ponds at issue in *SWANCC*. This Court should apply this principle to reverse the judgment of the court of appeals and to rule that the Clean Water Act does not apply to hydrologically isolated, intrastate wetlands.

DATED: February 14, 2006

Respectfully Submitted,
TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

Nos. 04-1034, 04-1384

In The
Supreme Court of the United States

JOHN A. RAPANOS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICI CURIAE BRIEF OF STATES OF ALASKA and UTAH, WESTERN URBAN WATER COALITION, NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, STATE WATER CONTRACTORS, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, WESTLANDS WATER DISTRICT, SAN DIEGO COUNTY WATER AUTHORITY AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

DAVID W. MÁRQUEZ
Attorney General
RUTH HAMILTON HEESE
JOHN T. BAKER
Assistant Attorneys General
State of Alaska
DEPARTMENT OF LAW
P. O. Box 110300
Juneau, AK 99811
(907) 465-3600
Attorneys for Amicus State of Alaska

RODERICK E. WALSTON
(*Counsel of Record*)
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
(925) 977-3304
Fax: (925) 977-1870
Attorney for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MARK SHURTLEFF
Attoney General
State of Utah
State Capital, Room 236
Salt Lake City, UT 84114
(801) 538-9600
Attorney for Amicus State of Utah

GUY R. MARTIN
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011
(202) 434-1650
Attorney for Amicus Western Urban Water Coalition

NORMAN M. SEMANKO
NATIONAL WATER RESOURCES ASSOCIATION
3800 North Fairfax Drive, Suite # 4
Arlington, VA 22203
(703) 524-1544
Attorney for Amicus National Water Resources Association

ROBERT MADDOW
BOLD, POLISNER, MADDOW, NELSON & JUDSON LLP
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596
(925) 933-7777
Attorney for Amicus Association of California Water Agencies

DOUGLAS K. MILLER
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
P. O. Box 43020
Phoenix, AZ 85080
(623) 869-2333
Attorney for Amicus Central Arizona Water Conservation District

JEFFREY KIGHTLINGER
General Counsel
METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
700 North Alameda Street
Los Angeles, CA 90012
(213) 217-6115
Attorney for Amicus Metropolitan Water District of Southern California

THOMAS W. BIRMINGHAM
General Manager/General Counsel
WESTLANDS WATER DISTRICT
3130 North Fresno Street
Fresno, CA 93703-6056
(559) 224-1523
Attorney for Amicus Westlands Water District

DANIEL S. HENTSCHKE
SAN DIEGO COUNTY WATER AUTHORITY
4677 Overland Avenue
San Diego, CA 92123
(858) 522-6791
Attorney for Amicus San Diego County Water Authority

BRENDA JAHNS SOUTHWICK
RONDA AZEVEDO LUCAS
CALIFORNIA FARM BUREAU FEDERATION
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5665
Attorney for Amicus California Farm Bureau Federation

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THIS COURT'S DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. U.S. ARMY CORPS OF ENGINEERS* INDICATES THAT THE CLEAN WATER ACT DOES NOT APPLY TO NON-NAVIGABLE WATERS, SUCH AS THE WETLANDS HERE, THAT LACK A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS	6
II. IN ENACTING THE CLEAN WATER ACT, CONGRESS BASED FEDERAL JURISDICTION ON THE FEDERAL NAVIGATION POWER, WHICH AUTHORIZES REGULATION OF NON-NAVIGABLE WATERS THAT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE IN NAVIGABLE WATERS	11
A. The Federal Navigation Power and State Water Rights Authority	11
B. Expansion of the Federal Navigation Power	15
C. Enactment of Clean Water Act	20
III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESSIONAL REGULATION OF NON-NAVIGABLE WATERS THAT DO NOT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE	25
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 13, 20, 24

California v. United States, 438 U.S. 645 (1978) 14, 16, 24, 27

Cappaert v. United States, 426 U.S. 128 (1976) 13

Carabell, et al. v. Army Corps of Engineers, 391 F.3d 704 (2004) 9, 10

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 8

Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944) 15

Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965) 16

First-Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946) 16

Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (1972) 15

Gibbons v. Ogden, 22 U.S. 1 (1824) 12

Gilman v. Philadelphia, 70 U.S. 713 (1866) 12

Gonzales v. Raich, 125 S.Ct. 2195 (2005) 26, 28, 29

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 15

Ickes v. Fox, 300 U.S. 82 (1937) 14

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 12

TABLE OF AUTHORITIES – Continued

Page

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 13, 26, 28

Kansas v. Colorado, 206 U.S. 46 (1907) 14

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 15

Martin v. Waddell, 41 U.S. 367 (1842) 12

National Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983) 14

Nevada v. United States, 463 U.S. 110 (1983) 14, 24

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 17, 18, 19, 27

Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 11, 12, 15

Pollard's Lessee v. Hagan, 44 U.S. 212 (1845) 12

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994) 23, 24

Santiago County Water Dist. v. County of Orange, 118 Cal.App.3d 818, 173 Cal.Rptr. 602 (1981) 15

Shively v. Bowlby, 142 U.S. 1 (1894) 12

Solid Waste Agency v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159 (2001) ..... *passim*

South Florida Water Management District v. Miccosukee Tribe, 541 U.S. 95 (2004) 24

The Daniel Ball, 77 U.S. 557 (1870) 17

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) 12, 13

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 16, 24

United States v. Grand River Dam Auth., 363 U.S. 229 (1960) 17, 19, 27

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 8, 25, 26, 28, 29

United States v. New Mexico, 438 U.S. 696 (1978) 13, 20

United States v. Oregon, 295 U.S. 1 (1935) 12

United States v. Republic Steel Corp., 362 U.S. 482 (1960) 16, 17, 28

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) ..... *passim*

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 9, 22, 23

United States v. State Water Res. Cont. Bd., 182 Cal.App.3d 82, 227 Cal.Rptr. 161 (1986) 14

United States v. Texas, 339 U.S. 707 (1950) 11, 12

United States v. Twin City Power Co., 350 U.S. 222 (1955) 13

Utah v. United States, 403 U.S. 9 (1971) 17, 22

Wickard v. Filburn, 317 U.S. 111 (1942) 28

Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888) 16

Wisconsin v. Illinois, 278 U.S. 367 (1929) 16, 25

TABLE OF AUTHORITIES – Continued

Page

Statutes

16 U.S.C. §§ 791 *et seq.* 16
33 U.S.C. § 401 15
33 U.S.C. § 403 ..... 16, 25
33 U.S.C. § 407 ..... 16, 25
33 U.S.C. § 1251(a) 25
33 U.S.C. § 1251(b) 23
33 U.S.C. § 1251(g) 23
33 U.S.C. § 1311(a) 7, 25
33 U.S.C. § 1341(a) 23
33 U.S.C. § 1342 7
33 U.S.C. § 1344 ..... 7, 20
33 U.S.C. § 1362(7) 7, 20, 25
33 U.S.C. § 1362(12) 7
33 U.S.C. § 1370 23
43 U.S.C. § 371 16
Cal. Pub. Res. Code §§ 21000 *et seq.* 15

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 25
U.S. Const. art. IV, § 3, cl. 2 13

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

33 C.F.R. § 209.120(d)(1) 8

33 C.F.R. § 328(c) 10

33 C.F.R. § 329.4 (1978) 17

OTHER AUTHORITIES

123 Cong. Rec. 39212 (1977) 24

Flood Control Act of 1944, 58 Stat. 887 (1944) 16

HOUSE CONSIDERATION OF REPORT OF CONFERENCE COMMITTEE, *compiled in* 1 LEGISLATIVE HISTORY OF WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 250-251 (1973) (statement of Rep. Dingell) 22

Rivers and Harbors Act of 1890, 26 Stat. 454 ..... 15, 18

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are the states of Alaska and Utah; public water agencies that are responsible for developing urban and agricultural water supplies; and a state farm bureau that represents farmers who depend on such supplies.

Amici states of Alaska and Utah are responsible for regulating all water resources, including wetlands, within their respective jurisdictions on behalf of the public, and represent the interests of their citizens in the regulation of such resources.

Amicus State of Alaska manages the largest geographic area of any state in the nation. Alaska has nearly 34,000 miles of shoreline, over three million lakes, and over 15,000 anadromous fish streams. In addition, the State of Alaska has over 174 million acres of wetlands, which are more wetlands than in all other states combined. Accordingly, almost any public infrastructure development, such as water and sewer, roads, or airport projects – as well as private development projects – involve wetlands or, in many instances, non-navigable waters.

The other *amici* are as follows:

- The Western Urban Water Coalition (WUWC) is a national coalition of municipal water agencies that serve most of the largest cities in the western United States. WUWC members serve over 31 million urban water consumers in Arizona, California, Colorado, Nevada, Utah and Washington.

---

[1] The states of Alaska and Utah are not required to obtain consent for the filing of this *amici* brief (Rule 37.4). The parties have consented to the filing of this brief by the other *amici* (Rule 37.3). This brief was not written in whole or part by the parties' counsel, and no one other than *amici* made a monetary contribution to its preparation (Rule 37.6).

- The National Water Resources Association (NWRA) is a federation of state water resources associations and individuals advocating federal policy, legislation and regulations that promote the protection, sound management and beneficial use of the nation's water resources, and is the oldest national association concerned with resources policy and development.
- The Association of California Water Agencies (ACWA) represents approximately 90% of the public water agencies in California, which develop and distribute water supplies for urban and agricultural use.
- The Central Arizona Water Conservation District (CAWCD) is the largest provider of renewable water supplies in Arizona. CAWCD operates a federal reclamation project, the Central Arizona Project, which delivers about 1.5 million acre-feet of water each year from Arizona's share of Colorado River water for municipal, industrial, agricultural and Native American water uses in Arizona.
- The State Water Contractors (SWC) represents 27 public water agencies in California that have contracted for water deliveries from the State Water Project, one of the nation's largest reclamation projects. The SWC members provide agricultural water supplies for more than one million acres of land, and municipal water supplies to about 23 million people, approximately two-thirds the population of California.
- The Metropolitan Water District of Southern California (MWD) is the nation's largest urban water district. MWD is a consortium of 26 cities and water districts located in all or part of six counties in southern California.

MWD provides water on a wholesale basis to water districts that distribute water to customers in their service areas, which include about 18 million people.

- The Westlands Water District (WWD), located in Fresno and King Counties, California, is the nation's largest agricultural water district in terms of irrigated acreage. WWD provides irrigation water and drainage service to the farmers located within its district, and also provides municipal and industrial water to local residents and entities.
- The San Diego County Water Authority (SDCWA) is the wholesale water supplier to its 23 member public agencies in San Diego County, California, and provides approximately 80-90% of the urban and agricultural water consumed annually in the county.
- The California Farm Bureau Federation (CFBF) is California's largest farm organization, with over 88,000 members in 53 county Farm Bureaus, and is charged with protecting and improving the ability of farmers and ranchers to provide reliable food and fiber supplies. CFBF members contribute the majority of agricultural production in California, the marketing of which reached $31.8 billion in 2004.

Although the *amici* represent many different governmental and non-governmental organizations, they have a mutual interest in proper interpretation of federal jurisdiction under the Clean Water Act. Pursuant to this Court's decisions and under federal law, *amici* states of Alaska and Utah have the primary right and responsibility for managing and protecting their lands and water. The *amici* public water agencies and farm bureau have acquired water rights under state or federal laws, or represent agencies, groups or individuals who have acquired such rights, or have